IN THE

Supreme Court of the United States

October Term, 1954

No. 29

The United States, *Petitioner*

v.

Koppers Company, Inc., Successor on Merger to Koppers United Company and Subsidiaries

On Writ of Certiorari to the United States Court of Claims

BRIEF FOR RESPONDENT

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period net income *in lieu of* the average base period net income."

In this case, therefore, there is only one excess profits tax imposed for the taxable year—the one determined under Section 722; computations as to what the tax would have been, but for this statutory direction as to how "the tax imposed" is to be determined, have no legal significance.

When all provisions of the Code relating to excess profits tax were applied to the taxpayer's situation for 1940, the amount by which the tax imposed exceeded the amount shown on its return was $260,554. This is the only amount ever determined as a deficiency in tax by the Commissioner and it is the only debt to the Government on which interest could be properly collected.

The Government argues that it is entitled to the excess interest because the taxpayer failed to comply with what the Government calls the "Congressional mandate" in Section 722(d). This section provided that—

> "The taxpayer shall compute its tax, file its return, and pay the tax shown on its return under this subchapter without the application of this section [Section 722] * * *."

The taxpayer in this case did comply with the requirements of Section 722(d). With respect to each of the years 1940 and 1941, it computed its tax, filed its return, and paid the tax shown on its return under Subchapter E without the application of Section 722. The Court of Claims so found. (R. 26.) Section 722(d) is neither a tax-imposing provision, nor an interest-imposing provision. It expressed only a rule of sound administration, and the taxpayer followed the rule exactly.

Section 3771(g), on which the Government also relies, says nothing about interest on a *deficiency*. Instead, it has to do with interest on *overpayments*. Since the question here is whether there was an actual deficiency which will support the Government's claim for interest, Section

3771(g) is not helpful in answering that question. In any event, it is in derogation of the long-standing policy of Congress to pay interest to taxpayers an overpayments of tax, and it certainly should not be extended to cases of "potential deficiencies" without express statutory provision.

The Government also argues that this case is ruled by *Manning* v. *Seeley Tube & Box Co.*, 338 U.S. 561, which dealt with a provision of law under which a taxpayer who suffered a net loss in 1943 was allowed relief from this 1943 hardship by allowing it to carry back the loss in abatement of the tax imposed on it for 1941.

The statutory provisions applicable to the two situations in which entirely different facts are presented are not at all parallel and the decision reached by the Court of Claims in this case does not conflict with any principle established by this Court in the *Seeley Tube* case.

In the instant case, the only deficiency in tax which this taxpayer owed for 1940 was that stated in the Commissioner's formal statutory notice of deficiency—$260,554. The Government was entitled to and duly received interest on this amount. The excess interest which is disputed—that computed on the difference between $260,554 and $460,408—was not computed on a deficiency in tax and there is no warrant in the statute for its collection. The Government should therefore be required to refund it.

ARGUMENT

The taxpayer's excess profits tax liability for 1940 and 1941 was determined by the Commissioner of Internal Revenue to be greater than that shown in the taxpayer's returns. The difference was a deficiency. (Sec. 271.) The Commissioner on March 8, 1951, issued a notice of deficiency—the *only* notice of deficiency—which read as follows:

> "You are advised that the determination of your excess profits tax liability for the years ended December 31,

> 1940, 1941, * * * discloses deficiencies of $260,554.39, $95,749.33, * * * respectively." (R. 28.)

The taxpayer paid these amounts; no change is suggested by either party; the Government does not ask for any more tax.

The Government collected interest as to each of the two years on these deficiencies. The taxpayer does not claim refund of that interest and it is not in dispute. But in addition, the Government has collected interest on two excess amounts—$199,854 for 1940 and $330,981 for 1941—which are not a part of the tax for either year.

The Government seeks to justify collection of this excess interest in the following ways:

By asserting that the "correct tax" was a tax computed by the use of the actual average base period net income method under Section 713 rather than by the use of the constructive average base period net income method under Section 722—an assertion which, the taxpayer submits, is refuted by the Commissioner's own undisputed determination as to what the correct tax was and by the express provisions of the Code.

By contending, on the basis of the foregoing assertion, that there was an "original deficiency" which included not only the actual deficiency which the Commissioner found, but which included additional amounts of tax described in the Code as "excessive and discriminatory", which the Congress chose not to exact.

By contending that Sections 722(d) and 3771(g) of the Internal Revenue Code in some way affect the long-established statutory rule in Sections 292(a) and 271(a) as to when taxpayers shall be liable for interest and on what principal sums.

By contending that the provision designed to mitigate the losses in a later year by carrying back such losses to abate the tax in a year in which there was no loss is in essence the same as the provision under which the excess

profits tax credit for a single taxable year is determined by one of three alternative methods.

Each of these contentions is contrary to law and each is unsound in substance.

I. The Government Is Entitled to Collect Interest Only on a Deficiency in Tax, and There Was No Deficiency Here on Which the Disputed Interest Could be Assessed.

The statute permits the Government to assess and collect interest "upon the amount determined as a deficiency" (Sec. 292). The statute defines a deficiency as "the amount by which the tax imposed by this chapter exceeds the amount shown as the tax by the taxpayer on his return" (Sec. 271). The statute authorizes the Commissioner to send a notice to the taxpayer when he has determined a deficiency, and prohibits any assessment of a deficiency until such a notice has been sent (Sec. 272(a)). The taxpayer may waive the restrictions on assessment by a notice in writing filed with the Commissioner.

In applying these statutory requirements to this case, the fundamental question is what was "*the tax imposed*", because a deficiency is the difference between the tax imposed and the tax shown on the return.

The Internal Revenue Code in Chapter 2, sections 710-784 inclusive, contains the provisions imposing an excess profits tax.* This tax was designed to tax abnormal profits which were considered to result from the war effort during the period 1940-1945.

In order to determine the tax under these provisions, the excess profits net income for the taxable year was first arrived at. In order to ascertain how much of it was abnormal or "excess", there was a provision for deducting an excess profits credit representing "normal

* While the excess profits tax was imposed by Subchapter E of Chapter 2 of the Code (Secs. 710-784), the provisions in Chapter 1, in which sections 271, 272 and 292 are found, were made applicable by sections 728 and 729.

earnings" so that after the credit was taken, the remainder could properly be subjected to the high excess profits tax rate.

Congress foresaw that various difficulties would be encountered in arriving at a fair figure for this credit and provided three alternative methods for doing so:

No. 1—An average base period net income method (Sec. 713).

No. 2—An invested capital method (Sec. 714).

No. 3—In certain cases where the credit computed under method No. 1 or No. 2 would result in an "excessive and discriminatory tax", a method based on a *constructive* average base period net income (Sec. 722).

Congress also foresaw the administrative problem which would arise if each taxpayer were permitted to apply the complicated provisions of Section 722 in making its return. Congress therefore provided in Section 722(d) that the taxpayer should compute its tax, file its return and pay the tax shown on the return without applying Section 722. It could then request that its credit be determined under Section 722.

The taxpayer followed this procedure. It computed its tax and filed its return using method No. 2—the invested capital method. During the audit, it became evident that the Revenue Agent and the taxpayer could not agree on the proper application of that method, and method No. 1—the average base period net income method—was proposed as an alternative. But because the taxpayer believed a tax computed under method No. 1 would be "excessive and discriminatory", the taxpayer asked that its tax be computed using method No. 3.

The Commissioner and the taxpayer finally agreed in 1950 that the taxpayer had shown the tax computed under method No. 1 would be excessive and discriminatory and that the tax should be computed under method No. 3. The

tax computed using method No. 3 was $267,067 for 1940 and $1,877,037 for 1941. (R. 4-5, 7.) These amounts were "the tax imposed" by the Code. They were $260,554 and $95,749 greater than the amounts shown on the tax returns, and a deficiency in the latter amounts therefore resulted. They were the only deficiencies for 1940 and 1941 because they were the only amounts by which the tax imposed for each year exceeded the amounts shown as the tax on the returns.

The Government argues (Brief, p. 10) that the Commissioner "computed and determined the excess profits tax deficiencies both before and after applying Section 722 relief". The Government thus argues that there were two statutory deficiencies for each year. For 1940, this would mean that there must have been a statutory deficiency of $460,408 which was later reduced by Section 722 with a resulting statutory deficiency of $260,554. Carried a step further, if the Government is right, there were two taxes "imposed" for 1940, one for $466,921 and the other for $267,067.

To the contrary, the statute imposes only one tax. This is recognized in the Treasury's own Regulations, Section 30.722-2,* entitled "Constructive Average Base Period Net Income", which provides that, in general, if a taxpayer qualifies and establishes what would be a fair and just amount representing normal earnings to be used as a constructive average base period net income,

> "* * * the excess profits *tax* for the taxable year shall be determined by using the excess profits credit computed upon the basis of such constructive average base period net income *in lieu of* the actual excess profits credit based on income or invested capital, as the case may be." (Emphasis supplied.)

The conclusion reached in the regulations is clearly required by the statute. Section 710 provides that "there

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* As added by T.D. 5264, 1943 Cum. Bull. 761.

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BRIEF FOR RESPONDENT

OPINION BELOW

The opinion of the Court of Claims (R. 14-29) is reported at 126 C. Cls. 847, and at 117 F. Supp. 181.

JURISDICTION

The judgment of the Court of Claims was entered December 1, 1953. (R. 14, 29.) The jurisdiction of this Court is invoked under 28 U.S.C., Section 1255(1). The petition for certiorari was filed on March 1, 1954 and certiorari was granted on May 17, 1954. (R. 41.)

STATUTES INVOLVED

The pertinent statutory provisions (Sections 271, 272, 292, 322, 710, 713, 714, 722, 728, 729, and 3771 of the Internal Revenue Code of 1939) are printed in the Appendix at pages 28 to 36.

QUESTION PRESENTED

Whether the Commissioner of Internal Revenue was entitled under the Internal Revenue Code to charge this taxpayer for interest on amounts of money which were not a part of the tax imposed on the taxpayer by the excess profits tax provisions of the Code.

STATEMENT

The taxpayer, respondent herein, seeks to recover certain amounts which were exacted as interest by the Commissioner. This disputed interest was computed on amounts which under the law are excessive and discriminatory and which are no part of the tax imposed. These amounts are hypothetical in character, merely representing the amounts which would have been part of the tax imposed had the taxpayer not been entitled to have its tax determined in accordance with Section 722 of the Internal Revenue Code of 1939, instead of Section 713 or Section 714.

The taxpayer contends that there was no legal basis for the Commissioner's action, and, in addition, that it is unreasonable to impute to Congress an intent to allow the Commissioner to collect interest on an amount which was never a part of the tax imposed. The Court of Claims has

considered this problem in three different cases and has agreed with the taxpayer's contentions each time, as have three District Courts. The only court which has disagreed is the Court of Appeals for the Fifth Circuit.*

The findings of fact of the Court of Claims are printed in the record at pages 25 to 29. The taxpayer believes that certain facts omitted from the Government's statement of the case are essential to a clear understanding of the issue, and therefore summarizes the facts as follows.

Koppers Company, Inc., is the successor, through a statutory merger effected in 1944, to Koppers United Company and its subsidiaries. For convenience, both Koppers Company, Inc., and its predecessor are referred to as the taxpayer.

The taxpayer filed original and amended consolidated excess profits tax returns for the calendar years 1940 and 1941. The amended return for 1940 showed excess profits net income of $3,653,890,** an excess profits credit of $3,623,876, and an excess profits tax liability of $6,512, which was paid. The amended return for 1941 showed excess profits net income of $6,545,206, an excess profits credit of $3,494,726, and an excess profits tax liability of $1,781,288, which was paid. (R. 25-26.)

In arriving at the amounts of such taxes, the taxpayer used an excess profits credit computed on the invested capital basis under Section 714 of the Internal Revenue Code. This credit was computed without the application

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* The courts have agreed with the taxpayer's contentions in Henry River Mills Company v. United States, 96 F. Supp. 477 (Ct. Cls. 1951); Koppers Company, Inc. v. United States, 117 F. Supp. 781 (Ct. Cls. 1953); Linn Mills v. United States, 121 F. Supp. 887 (Ct. Cls. 1954); Premier Oil Refining Company of Texas v. United States, 107 F. Supp. 837 (N.D. Texas, 1952); Kuder Citrus Pulp Company v. United States, 117 F. Supp. 395 (S.D. Fla., 1953); and Surface Combustion Corporation v. United States, 53-2 U.S.T.C. ¶ 9653, 4 P-H 1953 Fed. Tax Serv. ¶¶ 72,793 and 72,804 (N.D. Ohio, 1953). To the contrary is United States v. Premier Oil Refining Company of Texas, 209 F. 2d. 692 (C.A. 5, 1954).

** Fractions of a dollar are omitted throughout.

of Section 722 of the Internal Revenue Code. (R. 23, n. 10: R. 26.)

On September 15, 1943, the taxpayer filed applications asking to have its excess profits credit computed on a constructive average base period net income in accordance with Section 722 of the Internal Revenue Code. Amended applications were filed on September 10, 1945, and November 20, 1945. (R. 26.)

At various times the Internal Revenue Agent in Charge at Pittsburgh sent to the taxpayer copies of the Revenue Agent's Reports, showing a series of proposals using an excess profits credit based on the actual average base period net income under Section 713, as follows: On September 23, 1946, there was proposed for 1940 an excess profits net income of $4,158,504, an excess profits credit of $2,612,509, and an excess profits tax deficiency of $710,753. On March 1, 1949, the proposals were changed so that there was then proposed for 1940 an excess profits net income of $3,543,895, an excess profits credit of $2,256,809, and an excess profits tax deficiency of $594,385. On April 29, 1949, there was proposed for 1941 an excess profits net income of $6,102,978, an excess profits credit of $2,576,117, and an excess profits tax deficiency of $272,078. (R. 26-27.)

On December 16, 1950, the taxpayer executed an "Agreement to Amount of Constructive Average Base Period Net Income Determined under Section 722, Internal Revenue Code", agreeing to a constructive average base period net income under Section 722 of $2,801,598 for 1940 and $3,394,944 for 1941. The amounts agreed to were approved by the Excess Profits Tax Council of the Bureau on January 10, 1951. (R. 26.)

On February 9, 1951, the Internal Revenue Agent in Charge in Pittsburgh sent to the taxpayer a letter reflecting this agreement. It showed deficiencies in excess profits taxes of $260,554 for 1940 and $95,749 for 1941. (R. 27.)

On February 14, 1951, the taxpayer filed a waiver on

Treasury Form 874, consenting to the assessment and collection of the proposed deficiencies of $260,554 for 1940 and $95,749 for 1941, "together with interest thereon as provided by law". (R. 27; Exhibit K to McLaughlin Affidavit, not printed but part of the Record, R. 39.)

On February 26 and 27, 1951, an Abnormality Claims Reviewer in the Commissioner's office in Washington made computations to show what the excess profits tax liability for 1940 and 1941 would have been, using the actual average base period net income of the taxpayer under Section 713 instead of its constructive average base period net income under Section 722. (R. 27-28.)

This computation indicated that if Section 722 had not been applicable and if the tax had been computed under Section 713, there would have been additional excess profits taxes of $460,408 for 1940 and $426,730 for 1941 instead of $260,554 and $95,749 as determined by the Commissioner and agreed to by the taxpayer. Interest of $217,376 was computed on $460,408 from March 15, 1941 to January 28, 1949. Interest of $230,504 was computed on $426,730 from March 15, 1942 to March 16, 1951. (R. 27-28.)

No notice of deficiency was issued by the Commissioner with respect to the results of his computation of the excess profits tax liability without the application of Section 722. (R. 28.)

On March 8, 1951, the Commissioner issued a statutory notice of deficiency, setting forth the deficiencies agreed upon on February 14, 1951. These deficiencies—$260,554 for 1940 and $95,749 for 1941—were assessed on April 17, 1951, together with interest of $217,376 for 1940 and $230,504 for 1941. The assessments were paid on April 24, 1951. (R. 28-29.)

The undisputed interest on the 1940 deficiency of $260,554 from March 15, 1941, to January 28, 1949, is $123,017. The undisputed interest on the 1941 deficiency of $95,749 from March 15, 1942, to March 16, 1951, is $51,720. (R. 29.)

The taxpayer filed a timely refund claim for $94,358

representing the difference between the interest paid for 1940, $217,376, and the undisputed interest of $123,017. Likewise, a claim for refund was filed for $178,784, representing the difference between the interest paid for 1941, $230,504, and the undisputed interest of $51,720. (R. 29.)

The Court of Claims found that the taxpayer is entitled to recover excess interest of $94,358 for 1940 and $178,784 for 1941, less a set-off of $2,926, and a judgment was entered for $270,216, with interest thereon as provided by law. (R. 29.)

SUMMARY OF ARGUMENT

The Internal Revenue Code has specifically dealt with the subject of interest on income and excess profits taxes,* and it does not authorize the collection of the interest here in controversy. The Government is authorized to collect interest "upon the amount determined as a deficiency" (Sec. 292). The Code defines a deficiency as the "amount by which the tax imposed by this chapter exceeds the amount shown as the tax by the taxpayer upon his return" (Sec. 271).

In this case the only unpaid taxes for 1940 and 1941 were the deficiencies which existed for those years. The only deficiencies ever determined by the Commissioner of Internal Revenue were those set forth in his notice of deficiency dated March 8, 1951 as follows:

> "You are advised that the determination of your excess profits tax liability for the years ended Dece ber 31, 1940, 1941, * * * discloses deficiencies of $260,554.39, $95,749.33, * * * respectively." (R. 28.)

The taxpayer consented to the assessment and collection of the deficiencies in tax in the amounts of $260,554 for

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* In the following sections of the Internal Revenue Code of 1939, Congress has given attention to interest questions: 22(d)(6)(A) and (F), 127(e)(5), 131(e), 146(f), 292(a), 292(b), 292(c), 292(d), 293(a), 294(a)(1), 294(a)(2), 294(b), 295, 296, 297, 298, 506(b), 506(j)(2)(A), 781(e), 784(b), 3746(d), 3771(a) and (b), 3771(d), 3771(e), 3771(g), 3773, 3779(i), 3794, 3804(a), 3804(f), and 3808(b)(4).

1940 and $95,749 for 1941, together with interest *thereon* as provided by law. (R. 27; Exhibit K to McLaughlin Affidavit, not printed but part of the Record.)

The Commissioner then made the following assessments and demanded payment:

	Deficiency in Tax	Interest
1940	$260,554	$217,376
1941	95,749	230,504

(R. 29.)

For simplicity, further discussion in this summary is limited to the year 1940. The same considerations apply to 1941, though different amounts are involved.

Interest for the proper period at 6% on the tax deficiency of $260,554 for 1940 is $123,017. It is thus apparent that the Government assessed *excess* interest of $94,359 ($217,376 minus $123,017) on the 1940 deficiency. Likewise, excess interest was assessed on the 1941 deficiency. The aggregate amount of this excess interest is the interest in dispute.

This excess interest was assessed on an amount which was not a part of the excess profits tax imposed. It purports, instead, to be computed on an amount—often referred to as a "potential deficiency"—which would have been a part of the tax if Section 722 had not required a different result.

Section 722 is an integral part of the Code provisions imposing the excess profits tax. In a case in which Section 722 is applicable, a tax computed without Section 722 is not "the tax imposed" for the taxable year, and the statute declares a tax so computed to be "excessive and discriminatory".

The Code in Section 722(a) expressly provides that in any case to which Section 722 applies "the tax shall be determined" by using the "constructive average base

Whatever Congress might have done, it did not change the definition of a deficiency, nor did it require the payment of interest on an amount which was not a deficiency. A deficiency is still defined as the difference between *the tax imposed* and the amount shown as the tax by the taxpayer upon his return. Interest is specifically required by Congress to be paid only on a deficiency. The Government would have this Court believe that Congress required interest to be paid on an amount which never qualified as a deficiency. The Code contains no such provision, and certainly it should not be inferred from a section in derogation of the taxpayer's ordinary and long-standing right to interest on *overpayments*.

III. The Decision of the Court of Claims Does Not Depart From the Principles Established by This Court's Decision in Manning v. Seeley Tube & Box Co.

The Government contends that the issue here presented is "essentially the same issue as was presented in *Manning v. Seeley Tube & Box Co.*, 338 U.S. 561," and Judge Madden of the Court of Claims in his dissenting opinion said that the difference between this case and *Seeley Tube* and similar loss carry-back cases is "more apparent than real".

The difference between the issue in that case and the issue in this case is not only apparent but is very real; in fact, it is fundamental.

In the *Seeley Tube* case, the tax imposed for 1941 was greater than the amount shown on the 1941 return. The Commissioner issued a statutory notice of deficiency and the company, by not contesting it, admitted that the tax imposed was greater than it had shown on its return. Thus there was a real, admitted deficiency for 1941.

In 1943—two taxable years later—Seeley Tube had a net operating loss. Under the carry-back provisions this produced an abatement and cancellation of all of the tax liability for 1941, because the 1943 loss was greater than

the entire taxable income for 1941. Under those circumstances, this Court held—and we think rightly—that the interest on the 1941 deficiency was properly collected and retained by the Government.

At the end of the taxable year 1941, no one could tell that Seeley Tube would have a net loss in the year 1943, and consequently, that a part of the 1941 tax would be later abated. It was not until the year 1943 that Seeley Tube suffered losses, and in mitigation of these 1943 losses, the law allowed it a cancellation of all the income and excess profits tax which had been imposed for 1941. It was, as the Court held, a subsequent abatement and remission of the tax imposed for the earlier year. In the instant case, the tax imposed was determined under Section 722 on the facts existing at the end of the taxable year. *There was no subsequent abatement because of facts occurring in a later taxable year.*

In discussing provisions of law as to the earlier year, independent of carry-backs, this Court in *Seeley Tube* recognized that they imposed a tax "actually due" that year and that if a taxpayer underpaid the tax actually due for that year, interest exacted on the underpayment—an actual deficiency—would not be refunded when later carry-back adjustments resulted in remitting the tax. Mr. Chief Justice Vinson, speaking of the tax imposed for 1941, pointed out that the statute required the taxpayer—

> "* * * to file a return for the previous fiscal year and pay the amount of the tax actually due for that year. If this return is erroneously calculated and the payment is less than the tax properly due, the Commissioner * * * may assess a deficiency, the difference between the tax imposed by law and the tax shown upon the return. Interest upon this deficiency * * * was lawfully due * * *." (338 U.S. at 565.)

The Chief Counsel of the Bureau of Internal Revenue recognized that the decision rested on the presence of a real deficiency for the earlier year. In reviewing an earlier

shall be levied * * * on the adjusted excess profits net income * * * *the tax* shown in the following table: * * *". Section 722 provides that if the taxpayer establishes that "*the tax* computed under this subchapter (without the benefit of this section) results in an excessive and discriminatory tax * * *, *the tax* shall be determined by using such constructive average base period net income *in lieu of* the average base period net income otherwise determined under this subchapter". This is entirely inconsistent with the statement in the Government's brief, page 5, that the tax was "abated", and no support is found for such a statement in the findings of the Court of Claims, page 29 of the Record, or elsewhere.

In other words, the statute tells the taxpayer that if a tax computed under method No. 1 or method No. 2 would be excessive and discriminatory, it can have its tax determined by using method No. 3 *in lieu of* the other methods. The tax arrived at under the method agreed upon is "the tax imposed" by the statute. As Judge Littleton said in writing the opinion of the Court of Claims in this case,

> "* * * A review of the history and purpose of Section 722 convinces us that it is merely a refinement of the basic policy embodied in the excess profits tax scheme and not a departure from it. It affords an alternative formula for determining the amount to be exacted when the economic facts of a particular corporation will not fit properly into the 'average base period net income' mechanism. The result sought is a fair and equitable tax *in lieu of*, not *in mitigation of*, an excessive and discriminatory one. It follows therefore that where the factual and procedural requirements of Section 722 have been met, the Commissioner must take cognizance of that section in 'determining' a 'deficiency', as those terms are used in Sections 292(a) and 271. In so doing the constructive average base period net income must of necessity be used in arriving at the basis on which interest is computed as for the determination and assessment of the tax itself. Once Section 722 is, on the facts established, brought to bear on an appropriate situation it is an integral part of

the applicable tax law and cannot be employed electically by the Commissioner of Internal Revenue. * * *" (R. 19-20.) (Emphasis by the Court.)

To adopt the Government's argument would be to say that although a tax computed under method No. 1 or No. 2 would be excessive and discriminatory, Congress nevertheless intended to collect interest on the excessive amount, even though it refrained from imposing such an excessive and discriminatory tax. The taxpayer submits that to impute such an intent to Congress—in the absence of an express statutory provision—is wholly unreasonable.

Moreover, the Government's argument that there were two deficiencies *determined* for each taxable year—one before and one after the application of Section 722—is refuted by what the Commissioner did in this case.

On December 16, 1950, the taxpayer and the Commissioner agreed upon a constructive average base period net income and on January 10, 1951, this agreement was approved by the Excess Profits Tax Council of the Bureau. On February 9, 1951, the Revenue Agent in Charge sent a letter to the taxpayer, reflecting this agreement and proposing deficiencies of $260,554 for 1940 and $95,749 for 1941. (R. 26-27.) Contrary to the Government's brief, page 3, there was no agreement whatever at any time between the Government and the taxpayer with respect to the amount of any excess profits tax liability without the application of Section 722, nor did the letter of February 9 show or reflect any such amount. On February 14, 1951, the taxpayer consented to the immediate assessment and collection of these deficiencies "together with interest as provided by law".

It was not until February 26 and 27, 1951, that a subordinate in the Commissioner's office in Washington made computations to show that the deficiencies without the application of Section 722 would have been $460,408 for 1940 and $426,730 for 1941. The work sheets on which these computations were made are printed at pages 36A

and 38A of the Record. It is apparent that they were for internal purposes in the Bureau. No notice—formal or otherwise—of these computations was ever sent to the taxpayer prior to the filing of this action. (R. 28.)

The Government's brief (pp. 3-4) states that the foregoing "computations were made by the Commissioner in accordance with the administrative practice of first determining the excess profits tax liability without the allowance of any relief provided by Section 722, and then giving effect to the relief allowed under that section." If such was the usual administrative practice, obviously the Commissioner did not follow it in this case, since the deficiencies arrived at by using the constructive average base period net income under Section 722 were proposed by the Revenue Agent on February 9th and were accepted by the taxpayer on February 14th, while the computations were not made until February 26th and 27th, 1951. (R. 27-28.)

Then on March 8, 1951, the Commissioner confirmed the agreement by issuing his statutory notice in which he said that a *determination* of the tax liability for 1940 and 1941 disclosed deficiencies of $260,554 and $95,749. (R. 28.) The Commissioner's counsel can hardly contend now that the Commissioner ever *determined* a deficiency of $460,408 for 1940 and $426,730 for 1941 in face of the fact that he gave no indication of any such action at the time. Moreover, no deficiencies in those amounts ever existed.

The Government uses in its brief such terms as "correct tax", "original deficiencies", "residual deficiencies", "pre-existing deficiencies", and "net amounts of the deficiencies" to avoid the plain terms of the statute. The Code provides for the imposition of one tax and defines a deficiency as the excess of the tax imposed over the tax shown on the return. There was only one tax imposed and there can be only one deficiency for each year in this case. The taxpayer paid the interest on these deficiencies and submits that the exaction of "interest" on any other amount is wholly unwarranted.

Moreover, these deficiencies are the only amounts on which the Government should want to collect interest; if the principal sums are excessive and discriminatory, interest collected on them is likewise excessive and discriminatory.

II. Neither Section 722(d) Nor Section 3771(g) Supports the Government in This Case.

A. Section 722(d)

Section 722(d) provides, with respect to taxpayers who seek to have their excess profits tax determined under the Section 722 method, that—

> "The taxpayer shall compute its tax, file its return, and pay the tax shown on its return under this subchapter without the application of this section, * * * ."

Apparently overlooking Finding 1(c), R. 26, the dissenting judge in the Court of Claims thought the taxpayer here had failed to comply with this provision, and that it had thereby deprived the Government of the use of money for which it should pay interest. The Government, ignoring Finding 1(c), relies heavily on the taxpayer's assumed failure to comply with this section.

It should suffice to point out that the Court of Claims found in this case, with respect to the excess profits tax returns for both years, that—

> "The returns mentioned in the two paragraphs next above were made and the tax reported thereon was computed without the application of Section 722 of the Internal Revenue Code." (R. 26.)

Also, the taxpayer's returns for 1940 and 1941* show that the taxpayer filed its returns under method No. 2, the invested capital method prescribed in Section 714. As the majority opinion of the Court of Claims pointed out,

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* Not printed, but filed as part of the record in this Court.

> "On the record before us it would appear that plaintiff's returns as filed reflected substantially the correct amount of tax under the theory on which those returns were made and the tax computed, i.e., Equity Invested Capital. It was only when the 'average earnings' method was employed by the Commissioner that the 'potential deficiencies' now in question resulted." (Note 10, R. 23.)

The taxpayer here did exactly what Section 722 (d) required—it made its returns without applying Section 722 and paid the tax shown to be due on the returns. The Commissioner of the Court of Claims so found in Finding 1(c), R. 10, and the Government took no exception to this finding as it was permitted to do under Rule 46 of the rules of the Court of Claims. The Court, having considered the evidence and the report of its commissioner, made the same finding, R. 26. No objection was raised to this finding in the Government's petition for certiorari. The question of the correctness of this finding is therefore not before this Court.*

But even if this question were open, the Government's argument is completely unsound. The Government reads into Section 722(d) a "mandate", and asserts (Brief, p. 21) that—

> "* * * the Congressional intent to require computation and *full payment* of the tax when the return is due, without the application of Section 722, could hardly have been expressed in more unequivocal terms." (Emphasis supplied.)

Section 722(d), however, says nothing about "full payment of the tax", nor does it say that the taxpayer must pay

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* In United States v. New York Indians, 173 U.S. 464, this Court said: "This court has repeatedly held that the findings of the court of claims in an action at law determine all matters of fact, like the verdict of a jury, and that where there is any evidence of a fact which they find, and no exception is taken, their finding is final * * *." Cf. Stone v. U.S., 164 U.S. 380 (1896) and United States v. Penn Foundry & Mfg. Co., 337 U.S. 198, 205 (1949).

"the tax imposed" nor "the tax ultimately determined by the Commissioner to be the tax due".

The statute does say that the taxpayer "shall compute its tax, file its return, and pay the *tax shown on its return*" without applying Section 722.

What did Congress mean when it directed the taxpayer to "compute its tax" and "pay the tax shown on its return"? After many years experience with tax returns of large corporate groups, Congress knew that it would be a rare occasion indeed when such a return, with all of its complicated legal and accounting problems, would show on its face the ultimate tax liability—"the tax imposed". Congress knew that these complicated returns inevitably give rise to differences between the taxpayer and the Government, and that these differences often involve large sums, requiring many years of careful consideration by both parties before the final tax liability—"the tax imposed"—is settled.*

The Internal Revenue Code is highly technical in some of its parts, and therefore the most careful attention is given to its drafting. Had Congress intended Section 722(d) to have the meaning the Government argues for, it could have directed the taxpayer "to compute and to pay

* In view of the difficulty which the Revenue Agent actually experienced in making a computation of the taxpayer's excess profits tax liability without using Section 722, it is not surprising, and certainly not reprehensible, that the taxpayer, in the year 1941 when its 1940 return was filed, did not forecast the tax liability which would be agreed upon in 1951 after extensive examinations and negotiation covering a period of ten years. The findings of the Court of Claims show the difficulty which the Revenue Agent had in making up his mind what this 1940 computation should be. As of September 23, 1946, it shows that he thought $710,753 was right. By March 1, 1949, he had concluded that the foregoing figure was wrong and that the right figure was $594,385, but in 1951 he finally concluded that both of his previous computations were wrong and that since Section 722 was applicable, the deficiency was $260,554. At no time did the Revenue Agent who audited these returns ever propose a deficiency of $460,408 for 1940—the amount on which the Government has computed interest.

the tax imposed'' without the application of Section 722. But Congress knew that such a direction would be futile in the case of these corporate groups, because not a single one could ever hope to forecast in its return the tax liability on which it would finally agree with the Commissioner, regardless of the penalty.

All Congress intended, as the legislative history indicates, was that the taxpayer compute its tax and pay the tax shown on the return without trying itself to apply the completely new and complicated provisions of Section 722. There is no indication that it intended or even hoped that Section 722(d) would bring about the revolutionary result of having every corporate taxpayer compute its tax in such a way as to reflect complete agreement with the Commissioner on every provision of the Code except Section 722. But the Government says that is what was required—''full payment of the tax when the return is due''—and that failure to pay the exact amount results in interest on a ''potential deficiency''.

To the contrary, Congress added Section 722(d) to the Code in 1941 to express a rule of good administration, as shown by the Senate Report:*

> ''*Administrative procedure.*
>
> ''It is deemed advisable in the interest of good administration, in view of the nature of the problem presented by section 722, that the taxpayer should not be permitted to apply the section in the computation of the excess-profits tax liability shown upon its return and that the taxpayer should be required to conform to reasonable restrictions with respect to the time within which it may make application for the benefits of the section. Accordingly, under the provisions of subsection (e) [(d) in H. Rept.] a taxpayer is not permitted to claim the benefits of section 722 in computing its tax upon the return. * * *''

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* Senate Report No. 75, 77th Congress, 1st Session (1941), p. 13.

Without that provision a taxpayer entitled to Section 722 treatment would have made its return using method No. 3. Congress, having determined for good reasons that the Government should participate in the application of this method because of its difficulty, directed in Section 722(d) what the taxpayer should do at return-time, that is, that it should compute its tax "without the application of Section 722". It is a negative provision, not an affirmative imposition of tax; no tax-imposing words appear in it. The direction is that the "tax shown on the return" shall be paid. Certainly there are no provisions in it changing the rules in Section 292 governing interest, nor are there any provisions in it which change the definition of deficiency in Section 271.

If Congress had really wanted to charge this taxpayer $94,359 for 1940 and $178,784 for 1941 of so-called interest on the phantom deficiency because of the taxpayer's failure to foresee an amount which did not play any part in determining the tax imposed, Congress would have done so by modifying the definition of deficiency in Section 271.

The Government argues (Brief, pp. 17-18) that to sustain the Court of Claims would be to invite any taxpayer on the due date of its return to hazard a guess whether and to what extent Section 722 might be applicable. It points out dire consequences which would follow. But regardless what may happen if a taxpayer should hazard such a guess and try to imagine what will be the tax imposed after Section 722 is applied, the simple, uncontroverted fact is that this taxpayer did not hazard such a guess. Instead, it computed its tax (on the invested capital method), filed its returns, and paid the taxes shown on its returns under this subchapter without the application of Section 722—just as Section 722(d) required it to do. (R. 26.)

The majority opinion of the Court of Claims makes adequate answer to the Government's argument that the taxpayer would be encouraged not to comply with the direction

that the tax computed without Section 722 shall be paid in by the taxpayer:

> "* * * While there is no doubt that 722 (d) could not be ignored, and the taxpayer could not anticipate the applicability of, or apply, Section 722 in its original return, we are of the opinion that the remedy for its violation or for failure otherwise to file a substantially correct return is to be found in the penalty provisions of the U. S. Code rather than Section 292 (a), under the provisions of which we think, in view of the facts and circumstances of this case, an attempt has been made to exact illegal and unauthorized interest on 'potential' deficiencies never 'determined' under the statute nor authorized to be asserted by law." (R. 22-23.)

Congress did not say in Section 722(d) that the taxpayer must file an absolutely correct return and pay exactly what would ultimately be determined to be the correct tax. It only required that whatever the taxpayer did in computing its tax—presumably its best honest effort—it must not apply Section 722 in its computation. This taxpayer fully complied with that requirement.

B. Section 3771(g)

The Government relies on Section 3771(g) which denies to the taxpayer interest on overpayments made under Section 722 for the years 1940 and 1941 and thus allows the Government free use of the taxpayer's money for a period ending when the Government refunds to the taxpayer these overpayments. The Government fails to demonstrate, however, how a section which has to do with interest on *overpayments* can furnish the missing statutory authority for collecting interest on an amount which does not satisfy the statutory definition of a *deficiency*.

The Government argues that since Section 3771(g) allows no interest on overpayments resulting from the application of Section 722 for the years 1940 and 1941, Congress intended that the Government should have free use for an

indefinite period of time of a part of the taxpayer's money in every case in which the provisions of Section 722 were applicable. Thus, the Government seeks to charge taxpayers interest on an amount representing the "excessive and discriminatory" tax which would have been paid if the third credit-computing method had not been applicable.

This Court has frequently held that neither the administrative taxing authorities nor the courts can supplant Congress in the legislative field, particularly as to taxes. Whether or not the Commissioner believes that Congress should have enacted a corresponding provision requiring taxpayers to pay interest on a failure to make the overpayments, the fact remains that, when enacting Section 3771(g), Congress chose not to enact any provision supporting the Government in its collection of this interest and the Commissioner was without power to supply what he deemed to be an omission.

The limitation in Section 3771(g) on the allowance of interest on an overpayment of tax is in derogation of a legislative policy almost as long standing as the income tax.* The Government apparently argues that because Congress departed in this one instance from its history of fair dealing with taxpayers with respec. to interest on *overpayments*, it should be inferred that Congress meant also to exact interest from taxpayers even though the necessary *deficiency* did not exist on which such interest could be based. Had Congress so intended, it presumably would have expressed that intention in the Code.

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* When Congress inserted the provisions for interest on overpayments of taxes in the Revenue Act of 1921, it said (Sen. Rept No. 275, 67th Congress, 1939-1 (Pt. 2) Cum. Bull. 204):

> "Section 1324 makes an important change from existing law in providing that interest shall be paid on the overpayment of taxes at the rate of 6 per cent a year * * *. This provision is inserted for the purpose of expediting the refund of taxes and compelling the Government, in the event tha such refund is unnecessarily delayed, to pay interest at the ordinary rate."

opinion of his office in the light of the *Seeley Tube* decision, he said:*

> "* * * In concluding that the Bureau was entitled to interest, *the Supreme Court necessarily concluded that there was a real deficiency* existing prior to the occurrence of the carry-back loss *since the right to interest is dependent upon the existence of a deficiency.* * * *" (Emphasis supplied.)

In the instant case, the excess profits tax imposed could not be arrived at until all the provisions of law applicable to 1940 were applied to the facts existing up to the end of that year. When that task was completed, the 1940 tax imposed was determined by the Commissioner to be $260,554 greater than the tax shown on the return, and that amount alone constituted the deficiency. It was paid, together with interest on that amount. This deficiency was determined with reference to the events of 1940, and unlike *Seeley Tube*, subsequent events were not material. This deficiency and a similar deficiency for 1941 and the interest on those deficiencies are all that the Government is entitled to collect.

There is no soundness in the Government's argument that it can arrive at the tax imposed by law by applying only *part* of the Code provisions applicable to 1940, and that it can then wipe out a portion of that tax by applying the rest of the excess profits tax provisions, thus creating a situation "essentially the same" as a carry-back provision.

CONCLUSION

This is a case where the taxpayer established that a tax computed under Section 713 would be "excessive and discriminatory". It thereby became mandatory upon the Commissioner to determine the tax under the provisions of Section 722(a). This he did, yet he then computed

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* GCM 26455, 1950-1 Cum. Bull. 118.

interest not on the tax so determined but on that amount which is not only described by the statute as "excessive and discriminatory", but which is not the amount of any tax imposed by law. We submit that any such result is contrary to the plain provisions of law relating to the collection of interest and should be rejected by this Court.

The judgment of the Court of Claims should be affirmed.

Respectfully submitted,

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APPENDIX

Internal Revenue Code of 1939

Chapter 1—Income Tax

* * * * *

Sec. 271. Definition of Deficiency

As used in this chapter in respect of a tax imposed by this chapter "deficiency" means—

(a) The amount by which the tax imposed by this chapter exceeds the amount shown as the tax by the taxpayer upon his return; but the amount so shown on the return shall first be increased by the amounts previously assessed (or collected without assessment) as a deficiency, and decreased by the amounts previously abated, credited, refunded, or otherwise repaid in respect of such tax; or

(b) If no amount is shown as the tax by the taxpayer upon his return, or if no return is made by the taxpayer, then the amount by which the tax exceeds the amounts previously assessed (or collected without assessment) as a deficiency; but such amounts previously assessed, or collected without assessment, shall first be decreased by the amounts previously abated, credited, refunded, or otherwise repaid in respect of such tax.
(26 U.S.C. Sec. 271.)

* * * * *

Sec. 272. Procedure in General.

(a)(1) *Petition to Board of Tax Appeals.*—If in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect of the tax imposed by this chapter, the Commissioner is authorized to send notice of such deficiency to the taxpayer by registered mail. Within ninety days after such notice is mailed (not counting Sunday or a legal holiday in the District of Columbia as the ninetieth day), the taxpayer may file a petition with the Board of Tax Appeals for a redetermination of the deficiency. No assessment of a deficiency in respect of the tax imposed by this chapter and no distraint or proceeding in

court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such ninety-day period, nor, if a petition has been filed with the Board, until the decision of the Board has become final. * * *

* * * * *

(d) *Waiver of Restrictions.*—The taxpayer shall at any time have the right, by a signed notice in writing filed with the Commissioner, to waive the restrictions provided in subsection (a) of this section on the assessment and collection of the whole or any part of the deficiency. (26 U.S.C. Sec. 272.)

* * * * *

SEC. 292. INTEREST ON DEFICIENCIES.

(a) *General Rule.*—Interest upon the amount determined as a deficiency shall be assessed at the same time as the deficiency, shall be paid upon notice and demand from the collector, and shall be collected as a part of the tax, at the rate of 6 per centum per annum from the date prescribed for the payment of the tax (or, if the tax is paid in installments, from the date prescribed for the payment of the first installment) to the date the deficiency is assessed, or, in the case of a waiver under section 272 (d), to the thirtieth day after the filing of such waiver or to the date the deficiency is assessed whichever is the earlier. If any portion of the deficiency assessed is not to be collected by reason of a prior satisfaction, in whole or in part, of the tax, proper adjustment shall be made with respect to the interest on such portion.

(b) [Added by Section 2 of the Act of December 17, 1943, c. 346, 57 Stat. 601.] *Deficiency Resulting From Relief Under Section 722.*—If any part of a deficiency for a taxable year beginning prior to January 1, 1942, is determined by the Commissioner to be attributable to the final determination of an application for relief or benefit under section 722 for any taxable year, no interest shall be assessed or paid with respect to such part of the deficiency. If any part of a deficiency for a taxable year beginning after December 31, 1941, is determined by the Commissioner to be attributable to the final determination of an application for relief or benefit under section 722 for any

taxable year (excluding any portion of a deficiency of excess profits taxes constituting a deficiency by reason of deferment of tax under section 710 (a) (5), and excluding, in case the taxpayer has availed itself of the benefits of section 710 (a)(5), such portion of a deficiency under Chapter 1 as may be determined by the Commissioner to exceed any refund or credit of excess profits tax arising from the operation of section 722), no interest shall be assessed or paid with respect to such part of the deficiency for any period prior to one year after the filing of such application, or September 16, 1945, whichever is the later. (26 U.S.C. Sec. 292.)

* * * * *

Sec. 322. Refunds and Credits.

(a) *Authorization.*—

(1) Overpayment.—Where there has been an overpayment of any tax imposed by this chapter, the amount of such overpayment shall be credited against any income, war-profits, or excess-profits tax or installment thereof then due from the taxpayer, and any balance shall be refunded immediately to the taxpayer.
(26 U.S.C. Sec. 322)

* * * * *

Chapter 2—Additional Income Taxes

* * * * *

Subchapter E—Excess Profits Tax

Sec. 710 [As added by Sec. 201 of the Second Revenue Act of 1940, c. 757, 54 Stat. 974, and amended by Sec. 201 of the Revenue Act of 1941, c. 412, 55 Stat. 687]. Imposition of Tax.

(a) *Imposition.*—

(1) *General rule.*—There shall be levied, collected, and paid, for each taxable year, on the adjusted excess profits net income, as defined in subsection (b), of every corporation (except a corporation exempt under section 727) the tax shown in the following table:

* * * * *

[Added by Sec. 222(b) of the Revenue Act of 1942, c. 619, 56 Stat. 798].

(5) *Deferment of payment in case of abnormality.*—If the adjusted excess profits net income (computed without reference to section 722) for the taxable year of a taxpayer which claims on its return, in accordance with regulations prescribed by the Commissioner with the approval of the Secretary, the benefits of section 722, is in excess of 50 per centum of its normal tax net income for such year, computed without the credit provided in section 26(e) (relating to adjusted excess profits net income), the amount of tax payable at the time prescribed for payment may be reduced by an amount equal to 33 per centum of the amount of the reduction in the tax so claimed. For the purposes of section 271, if the tax payable is the tax so reduced, the tax so reduced shall be considered the amount shown on the return.

(26 U.S.C. Sec. 710)

* * * * *

SEC. 713. EXCESS PROFITS CREDITS—BASED ON INCOME.

(a) *Amount of Excess Profits Credit.*—The excess profits credit for any taxable year, computed under this section, shall be—

(1) *Domestic Corporations.*—In the case of a domestic corporation—

(A) 95 per centum of the average base period net income,

(B) Plus 8 per centum of the net capital addition as defined in subsection (g), or

(C) Minus 6 per centum of the net capital reduction as defined in subsection (g).

(2) *Foreign Corporations.*—In the case of a foreign corporation, 95 per centum of the average base period net income.

(26 U.S.C. Sec. 713.)

* * * * *

SEC. 714. EXCESS PROFITS CREDIT—BASED ON INVESTED CAPITAL.

The excess profits credit, for any taxable year, computed under this section, shall be the amount shown in the following table:

If the invested capital for the taxable year, determined under section 715, is:	The credit shall be:
Not over $5,000,000	8% of the invested capital.
Over $5,000,000	$400,000 plus 7% of the excess over $5,000,000.

(26 U.S.C. Sec. 714.)

* * * * *

SEC. 722 [As added by Sec. 201 of the Second Revenue Act of 1940, *supra*, and amended by Sec. 222(a) of the Revenue Act of 1942, *supra*, and the Act of December 17, 1943, *supra*]. GENERAL RELIEF—CONSTRUCTIVE AVERAGE BASE PERIOD NET INCOME.

(a) *General Rule.*—In any case in which the taxpayer establishes that the tax computed under this subchapter (without the benefit of this section) results in an excessive and discriminatory tax and establishes what would be a fair and just amount representing normal earnings to be used as a constructive average base period net income for the purposes of an excess profits tax based upon a comparison of normal earnings and earnings during an excess profits tax period, the tax shall be determined by using such constructive average base period net income in lieu of the average base period net income otherwise determined under this subchapter. In determining such constructive average base period net income, no regard shall be had to events or conditions affecting the taxpayer, the industry of which it is a member, or taxpayers generally occurring or existing after December 31, 1939, except that, in the cases described in the last sentence of section 722(b)(4) and in section 722(c), regard shall be had to the change in the character of the business under section 722(b)(4) or the nature of the taxpayer and the character of its business under section 722(c) to the extent necessary to establish the normal earnings to be used as the constructive average base period net income.

(b) *Taxpayers Using Average Earnings Method.*—The tax computed under this subchapter (without the benefit of this section) shall be considered to be excessive and discriminatory in the case of a taxpayer entitled to use the excess profits credit based on income pursuant to section 713, if its average base period net income is an inadequate standard of normal earnings because—

(1) in one or more taxable years in the base period normal production, output, or operation was interrupted or diminished because of the occurrence, either immediately prior to, or during the base period, of events unusual and peculiar in the experience of such taxpayer,

(2) the business of the taxpayer was depressed in the base period because of temporary economic circumstances unusual in the case of such taxpayer or because of the fact that an industry of which such taxpayer was a member was depressed by reason of temporary economic events unusual in the case of such industry,

(3) the business of the taxpayer was depressed in the base period by reason of conditions generally prevailing in an industry of which the taxpayer was a member, subjecting such taxpayer to

(A) a profits cycle differing materially in length and amplitude from the general business cycle, or

(B) sporadic and intermittent periods of high production and profits, and such periods are inadequately represented in the base period,

(4) the taxpayer, either during or immediately prior to the base period, commenced business or changed the character of the business and the average base period net income does not reflect the normal operation for the entire base period of the business. If the business of the taxpayer did not reach, by the end of the base period, the earning level which it would have reached if the taxpayer had commenced business or made the change in the character of the business two years before it did so, it shall be deemed to have commenced the business or made the change at such earlier time. For the purposes of this subparagraph, the term "change in the character of the business" includes a change in the operation or management of the business, a difference in the products or services fur-

nished, a difference in the capacity for production or operation, a difference in the ratio of nonborrowed capital to total capital, and the acquisition before January 1, 1940, of all or part of the assets of a competitor, with the result that the competition of such competitor was eliminated or diminished. Any change in the capacity for production or operation of the business consummated during any taxable year ending after December 31, 1939, as a result of a course of action to which the taxpayer was committed prior to January 1, 1940, or any acquisition before May 31, 1941, from a competitor engaged in the dissemination of information through the public press, or substantially all the assets of such competitor employed in such business with the result that competition between the taxpayer and the competitor existing before January 1, 1940, was eliminated, shall be deemed to be a change on December 31, 1939, in the character of the business, or

(5) of any other factor affecting the taxpayer's business which may reasonably be considered as resulting in an inadequate standard of normal earnings during the base period and the application of this section to the taxpayer would not be inconsistent with the principles underlying the provisions of this subsection, and with the conditions and limitations enumerated therein.

(c) *Invested Capital Corporations, Etc.*—The tax computed under this subchapter (without the benefit of this section) shall be considered to be excessive and discriminatory in the case of a taxpayer, not entitled to use the excess profits credit based on income pursuant to section 713, if the excess profits credit based on invested capital is an inadequate standard for determining excess profits, because—

(1) the business of the taxpayer is of a class in which intangible assets not includible in invested capital under section 718 make important contributions to income,

(2) the business of the taxpayer is of a class in which capital is not an important income-producing factor, or

(3) the invested capital of the taxpayer is abnormally low.

In such case for the purposes of this subchapter, such taxpayer shall be considered to be entitled to use the excess

profits credit based on income, using the constructive average base period net income determined under subsection (a). For the purposes of section 713(g) and section 743, the beginning of the taxpayer's first taxable year under this subchapter shall be considered to be that date after which capital additions and capital reductions were not taken into account for the purposes of this subsection.

(d) *Application for Relief Under This Section.*—The taxpayer shall compute its tax, file its return, and pay the tax shown on its return under this subchapter without the application of this section, except as provided in section 710(a)(5). The benefits of this section shall not be allowed unless the taxpayer within the period of time prescribed by section 322 and subject to the limitation as to amount of credit or refund prescribed in such section makes application therefor in accordance with regulations prescribed by the Commissioner with the approval of the Secretary. If a constructive average base period net income has been determined under the provisions of this section for any taxable year, the Commissioner may, by regulations approved by the Secretary, prescribe the extent to which the limitations prescribed by this subsection may be waived for the purpose of determining the tax under this subchapter for a subsequent taxable year.
(26 U.S.C. Sec. 722.)

* * * * *

SEC. 728 [As added by Sec. 201 of the Second Revenue Act of 1940, *supra*]. MEANING OF TERMS USED.

The terms used in this subchapter shall have the same meaning as when used in Chapter 1.

(26 U.S.C. Sec. 728.)

SEC. 729 [As added by Sec. 201 of the Second Revenue Act of 1940, *supra*]. LAWS APPLICABLE.

(a) *General Rule.*—All provisions of law (including penalties) applicable in respect of the taxes imposed by Chapter 1, shall, insofar as not inconsistent with this subchapter, be applicable in respect of the tax imposed by this subchapter.

(26 U.S.C. Sec. 729.)

* * * * *

CHAPTER 37—ABATEMENTS, CREDITS, AND REFUNDS

*   *   *   *   *

SEC. 3771. INTEREST ON OVERPAYMENTS.

(a) *Rate.*—Interest shall be allowed and paid upon any overpayment in respect of any internal revenue tax at the rate of 6 per centum per annum.

*   *   *   *   *

(g) [added by Sec. 2 (b) of the Act of December 17, 1943, *supra*] *Claims Based Upon Relief Under Section 722.*—If any part of an overpayment for a taxable year beginning prior to January 1, 1942, is determined by the Commissioner to be attributable to the final determination of an application for relief or benefit under section 722 for any taxable year, no interest shall be allowed or paid with respect to such part of the overpayment. If any part of an overpayment for a taxable year beginning after December 31, 1941, is determined by the Commissioner to be attributable to the final determination of an application for relief or benefit under section 722 for any taxable year, no interest shall be allowed or paid with respect to such part of the overpayment for any period prior to one year after the filing of such application, or September 16, 1945, whichever is the later.
(26 U.S.C. Sec. 3771.)